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Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

EMMANUEL BUCHANAN, BY AND THROUGH OZIA BREWINGTON, PLENARY GUARDIAN OF THE PERSON,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

MARK J. HEYRMAN
Counsel of Record
UNIVERSITY OF CHICAGO
LAW SCHOOL
MANDEL LEGAL AID CLINIC
6020 S. UNIVERSITY AVE
CHICAGO, ILLINOIS 60637
(773) 702-9611

QUESTIONS PRESENTED

1. Whether *Jackson v. Indiana*, 406 U.S. 715 (1972), requires that all criminal defendants found permanently unfit to stand trial be either civilly committed or released.

2. Whether *Jackson v. Indiana* permits commitment of permanently unfit defendants under a statutory scheme that provides less procedural and substantive protections than the scheme under which all other individuals are civilly committed.

3. Whether *Pate v. Robinson*, 383 U.S. 375 (1966), prohibits a state from holding a criminal trial to determine the guilt of an unfit defendant and using the outcome of the trial as the justification for confinement for a period of time equal to the maximum criminal sentence for the crimes with which the unfit defendant was charged.

PARTIES TO THE PROCEEDINGS

Petitioner is Emmanuel Buchanan, by and through Ozia Brewington, plenary guardian of the person. Respondent is the People of the State of Illinois.

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EMMANUEL BUCHANAN BY AND THROUGH OZIA BREWINGTON, PLENARY GUARDIAN OF THE PERSON,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

RICHARD A. DEVINE
State's Attorney of
Cook County, Illinois
JAMES E. FITZGERALD
ALAN J. SPELLBERG*
JON J. WALTERS
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
*Counsel of Record

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Attorney for Respondent

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

QUESTIONS PRESENTED

1. Whether the non-precedential unpublished order of the Illinois intermediate appellate court presents the question of whether Illinois may involuntarily commit a criminal defendant who is unfit for the foreseeable future because that defendant is a serious threat to public safety and whether petitioner has preserved for the Court's review his claim that Illinois procedure for involuntarily committing criminal defendants violates equal protection.

2. Whether petitioner's involuntary commitment in a criminal proceeding, where a court found petitioner committed an act of aggravated criminal sexual abuse of a minor beyond a reasonable doubt and which was based on the same standards that govern involuntary civil commitment, as well as additional safeguards, comports with the requirements of *Jackson v. Indiana*, 406 U.S. 715 (1972).

3. Whether there is a rational basis for treating differently those found to have committed a crime beyond a reasonable doubt and subject to civil commitment and those merely found subject to civil commitment.

4. Whether a discharge hearing, which the Supreme Court of Illinois considers to be an "innocent only" hearing where the only final determinations are acquittal or acquittal by reason of insanity consti-

tutes a criminal trial, particularly where the person committed by these proceedings may be released when no longer unfit for trial or dangerous and the same statute provides for an actual criminal trial upon a finding of competency for trial.

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BRIEF IN OPPOSITION

Respondent, the State of Illinois, respectfully requests that the Court deny the certiorari petition seeking review of the judgment of the Appellate Court of Illinois affirming petitioner's involuntary commitment. The Illinois appellate court upheld the judgment committing petitioner, who was unfit to stand trial on criminal charges, on the ground that he was subject to involuntary commitment under Illinois' Mental Health and Developmental Disabilities Code (MHDDC) because he suffered from a mental illness and was reasonably expected to inflict serious physical harm upon himself.

OPINION BELOW

The Illinois Appellate Court's unpublished order affirming the trial court's involuntary commitment of petitioner, *People v. Emmanuel Buchanan, by and through Ozia Brewington, plenary guardian of the person*, No. 1-06-1461 (Ill. App. Ct., Aug. 17, 2007), is attached as an appendix to the petition. The denial of petitioner's petition for leave to appeal to the Illinois Supreme Court, *People State of Illinois v. Emmanuel Buchanan, etc.*, No. 105346 (Ill. Sup. Ct., Nov. 29, 2007), is also attached to the petition as an appendix.

STATEMENT

Petitioner, Emmanuel Buchanan, was charged with two counts each of predatory criminal sexual assault, criminal sexual assault, and indecent solicitation of a child, and one count of aggravated criminal sexual abuse. (C.R. 14-21)[1] Petitioner was found unfit for trial on August 12, 2003, and remanded to the Illinois Department of Human Services (IDHS). (C.R. 33-34) After a "discharge hearing" before the Honorable Stuart Palmer on October 14, 2004, petitioner was found "not, not guilty"[2] of a count of aggravated criminal sexual abuse and remanded to the custody of the IDHS for an extended period of treatment of 15 months. (C.R. 71; R. 70) That count of the indictment alleged that petitioner committed an act of sexual conduct upon a girl under the age of thirteen. (R. 19) On January 5, 2006, defense counsel agreed with an order that would permit personnel at the Alton Mental Health Center(Alton) to proceed with a civil commitment hearing. (R. 5-8) The defense stipulated to the prosecutor's representations that a doctor opined that petitioner should be subject to civil commitment. (R. 5-7) Judge Lacy then ordered the IDHS to prepare and file a petition for involuntary commitment and to notify the court of the results. (R. 8) On February 14th, the court noted that defense counsel and the prose-

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[1] Numbers preceded by "C.R." and "R." refer to the pages of the common law record and report of proceedings, respectively.

[2] Under Illinois law, this is the finding reached by a court at the conclusion of a discharge hearing where the prosecution has proved the defendant guilty beyond a reasonable doubt and where the hearing does not result in an acquittal as a result of insufficient evidence or by reason of insanity. 725 ILCS 5/104-25(a)-(c).

cution had entered into an agreement that there was to be a civil commitment conducted. (Supp. R. 4) On March 29, 2006, Judge Lacy conducted the commitment hearing pursuant to Section 104-25(g) of the Illinois Code of Criminal Procedure. (R. 19-73) At the hearing, Dr. Sanghee Kim-Anspro, a psychiatrist at Alton, testified as an expert in psychiatry. (R. 23-29) Dr. Kim-Anspro had treated petitioner since July, 2004, and conversed with petitioner for a few minutes or up to 20 minutes on an almost daily basis. (R. 29-31, 45) Dr. Kim-Anspro and the treatment team met with petitioner once a month, and the team discussed his clinical condition every weekday morning. (R. 31) Petitioner was first admitted to Alton on September 4, 2003. (R. 31)

Dr. Kim-Anspro gave petitioner a series of fitness questions about three weeks before the hearing and determined that petitioner still had an inadequate understanding of the nature of the charge, the basic functions of court personnel, and court proceedings. (R. 35) Petitioner thought a judge listened, and he could not give an answer as to what else besides listening a judge did. (R. 35-6) He did not know what juries did besides listen and he thought misdemeanors punishable by less than a year of imprisonment were more serious than felonies. (R. 36) Petitioner was able to repeat what he heard in fitness classes, but without actual understanding. The doctor opined that petitioner remained unfit for trial. (R. 37) Petitioner's full scale IQ score is 51, which falls within the range of moderate mental retardation. Further, his overall age equivalent adaptive behavior score indicates that he functions at an age level of 5 years and 9 months. (R. 38)

Petitioner has a mental illness, schizoaffective[3] disorder, which is a major mental illness characterized by symptoms of psychosis and mood symptoms. (R. 32-33, 38) Petitioner receives Risperidone, an anti-psychotic medication; Benzotropine, to control the side effects of Risperidone; Sertraline, to control depression; Divalproex, to control aggression; and Difhenhydramine, to control anxiety. (R. 33-34) Petitioner also had attended treatment classes such as wellness class and fitness restoration classes. (R. 32) Petitioner had exhibited disorganized thinking and hallucinations in the past and suffers from periods of depression. (R. 38) Petitioner's hallucinations are controlled most of the time, but when he is under stress or becomes frustrated, he reports hearing voices for a few days. (R. 48-9) The voices tell him to kill himself. He hears them about three times a year, and had heard them on February 8, 2006. (R. 49) Later, he said he made it up. (R. 50) Petitioner reports feeling depressed two or three times a year to the level that he wants to hurt himself. (R. 56-7)

Two days before the hearing, petitioner became upset while talking on the phone and was overheard saying he was going to kill himself. Petitioner was placed on frequent observation as a result. On January 14, 2006, petitioner commented that he was going to get a gun and shoot people when he got out of Alton. On January 17th, he made "pop, pop, pop" noises while making a shooting gesture. (R. 39) On February 5th, Petitioner pulled the hair of a female staff member. (R. 59) Petitioner's

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[3] The transcript spells the disorder as psycho-effective disorder (R. 33), but that is plainly a spelling error. (C.R. 104, 114)

mental retardation renders him quite unpredictable and impulsive. (R. 40)

Dr. Kim-Anspro opined to a reasonable degree of medical certainty that petitioner is a threat to public safety. (R. 40-1) The doctor based that opinion on the seriousness and dangerousness of the offense and petitioner's refusal to discuss it, and because the doctor was aware of another incident two to three years before the charged offense in which the police were called because petitioner was allegedly acting inappropriately with a child. Petitioner remained at least a moderate to high risk to re-offend unless he was in a 24-hour supervised setting. (R. 41) The doctor's opinion was based mainly on petitioner's impulsivity and his history of inappropriate conduct with children. (R. 42)

The doctor opined that petitioner is capable of violence towards others and is a threat to public safety. When something comes to petitioner's mind, he will either say it or do it without thinking it through. (R. 60) Based on petitioner's one sex offense, he is at a high risk of re-offending. The doctor's assessment of petitioner's likelihood of re-offending is also based on the doctor's observations and his treatment of petitioner. (R. 63) Dr. Kim-Anspro took into consideration all of petitioner's threats and actions when assessing petitioner as a threat to public safety and as posing a moderate to high risk to re-offend. (R. 66-7) At times, petitioner is also a danger to himself. (R. 63) Two or three times in 2005, Petitioner would do something to lose privileges and then would threaten to kill himself because he was upset over losing privileges. Petitioner was then put on one-to-one round-the-clock observation. (R. 61) He needs a 24-hour supervised setting. (R. 64) It would not be appropriate

for petitioner to be placed with family members, outside of a supervised setting, because the offense took place while petitioner was living with his mother and his needs entail more than she can provide. (R. 64-5)

At the conclusion of the hearing, Judge Lacy found that, based on the testimony of Dr. Kim-Anspro, petitioner remains unfit for trial and is subject to involuntary admission under the Mental Health and Developmental Disabilities Code. (R. 71-2) The court further found that petitioner is a serious threat to the public safety. The court remanded petitioner to the IDHS for housing in a secure setting. Judge Lacy committed petitioner for treatment pursuant to 725 ILCS 5/104-25(g)(2) for a period not to run past August 12, 2010. (R. 72)

The Illinois Appellate Court affirmed the trial court's ruling in an unpublished order. (Pet. Appx. 1a-27a) Petitioner argued before that court that involuntary commitment of defendants unfit for trial under the Illinois Code of Criminal Procedure violated due process in light of *Jackson v. Indiana*, 406 U.S. 715 (1972) and that commitment under the jurisdiction of a criminal court of an unfit defendant who has been found unlikely to attain fitness violated due process in light of that case. (Pet. Appx. 12a) Among other things, the appellate court rejected petitioner's due process arguments based on *Jackson*, because under the Illinois Code of Criminal Procedure, the People proved that defendant committed a criminal act beyond a reasonable doubt. In contrast, the defendant in *Jackson* was involuntarily committed solely on account of his incompetence for trial. (Pet. Appx. 12a-14a) In addition, the appellate court held that petitioner was subject to involuntary admission under the Illinois Mental Health and Developmental Disabili-

ties Code because (1) it was undisputed that petitioner suffered from schizoaffective disorder, a mental illness, and (2) there was sufficient evidence that petitioner "was reasonably expected to inflict serious physical harm upon himself." (Pet. Appx. 17a-18a) The appellate court affirmed the judgment "on that basis." (Pet. Appx. 18a) The Illinois Supreme Court denied petitioner's petition for leave to appeal. (Pet. Appx. 28a)

REASONS FOR DENYING THE WRIT

THE UNPUBLISHED ORDER OF THE ILLINOIS APPELLATE COURT DOES NOT PRESENT THE QUESTION OF WHETHER ILLINOIS MAY INVOLUNTARILY COMMIT A CRIMINAL DEFENDANT WHO IS UNFIT FOR THE FORESEEABLE FUTURE BECAUSE THAT DEFENDANT IS A SERIOUS THREAT TO PUBLIC SAFETY. PETITIONER HAS FAILED TO PRESERVE FOR THE COURT'S REVIEW HIS CLAIM THAT ILLINOIS' PROCEDURE FOR INVOLUNTARILY COMMITTING CRIMINAL DEFENDANTS VIOLATES EQUAL PROTECTION. FINALLY, BECAUSE ILLINOIS LAW FULLY COMPORTS WITH THE MANDATES OF *JACKSON V. INDIANA* AND *JONES V. UNITED STATES*, DEFENDANT IS LEFT TO ARGUE THAT ILLINOIS HAS MERELY MISAPPLIED A PROPERLY STATED RULE OF LAW.

The Court should deny the writ of certiorari. First, the case does not present the question petitioner seeks to raise—whether Illinois unconstitutionally permits the involuntary commitment of criminal defendants because they are a serious threat to public safety. Sec-

ond, the judgment below was an unpublished order by an intermediate state court and therefore lacks any precedential value. Third, petitioner procedurally defaulted certain of his claims by not raising them in the Illinois Courts. Fourth, procedural default aside, petitioner failed to adequately flesh out those claims below, and in view of the principle of comity, his petition constitutes a poor vehicle for litigating the constitutional questions he presents. Fifth, Illinois law fully comports with this Court's due process precedent, as evidenced by the instant case where petitioner was involuntarily committed based on the standards for involuntary civil commitment, plus other reasons, and where a court determined that petitioner committed a sexual offense against a minor beyond a reasonable doubt. Illinois law also fully comports with this Court's equal protection precedent where, assuming petitioner is treated differently than individuals who are civilly committed, a rational basis exists to support the difference in treatment. Illinois law further complies with this Court's precedent because a discharge hearing is not a criminal trial. Ultimately, petitioner has failed to present an important question warranting review by this Court and all that remains is a contention that Illinois has misapplied a properly stated rule of law. Under these circumstances, this Court should deny the petition.

The unpublished order of the intermediate appellate court that petitioner challenges has no precedential value beyond the facts of this case, rendering the decision unworthy of certiorari. Gressman, *et al.*, *Supreme Court Practice* p. 506 (9th ed. 2007). *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (Court will not grant review unless issue is important outside the context of

the particular litigation, even if review would be necessary to correct appellate error and achieve justice). An unpublished order of the Appellate Court of Illinois is not precedential or intended to be authoritative: Illinois Supreme Court Rule 23(e) provides that "[a]n unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." As a result, the appellate court's decision in this case has no precedential value beyond the facts of the instant case, rendering the questions presented by petitioner unworthy of certiorari.

Further, one of petitioner's two claims has not been preserved for the Court's review. Petitioner contends that his commitment violated equal protection and due process protections. But petitioner never raised an equal protection claim until now. He only raised due process claims before the Illinois Appellate Court and Illinois Supreme Court. (Pet. Appx. 12a) The failure to raise this equal protection claim at all, much less before the highest court in Illinois, means it is not properly before this Court. With "very rare exceptions," this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (citation omitted). This rule is either jurisdictional or procedural. *Id.* at 90. *See also Howell v. Miss.*, 543 U.S. 440, 443 (2005) (per curiam) (Under Section 28 U.S.C. § 1257(a) and its predecessors, "this Court has almost unfailingly refused to consider any federal-law

challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" (citations omitted). As this Court stated in *Adams*, 520 U.S. at 90-91:

> The rule serves an important interest of comity. As we have explained, it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. Thus, the rule affords state courts an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes that could obviate any challenges to state action in federal court. . . . Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record. (citations and internal quotation marks omitted).

Even if the Court has jurisdiction to reach this newly raised issue, principles of comity should still bar consideration of petitioner's equal protection claim that was not fully developed in—and therefore not considered by—the state courts. *Cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking

one complete round of the state's established appellate review process.") Comity dictates that petitioner raise his claims in a way that permits full consideration of them by the state courts. *Id.* Having failed to raise his equal protection claim before now, petitioner may not avoid his default by presenting it in his certiorari petition.

In any event, Illinois law fully comports with this Court's relevant due process precedents. Perhaps most significantly, this case does not present the question petitioner asks the Court to review. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court held that if a criminal defendant will not attain the capacity to proceed to trial in the foreseeable future, then "the state must either institute the customary civil commitment proceeding . . . or release the defendant." *Id.* at 738. Petitioner "asks this Court to clarify the applicability" of this holding "to permanently unfit defendants confined, as they are under Section 104-25(g)(2), based on different standards than all other civilly committed individuals" under the MHDDC. (Pet. 8.) Petitioner hinges this request on the fact that this section includes a reason for commitment—defendant poses "a serious threat to the public safety"—that is not found in the MHDDC. (Pet. 9) But the fatal flaw in this argument is that the appellate court, citing the MHDDC, upheld petitioner's involuntary commitment "on the basis that defendant was reasonably expected to inflict harm on himself in the near future (405 ILCS 5/1-119(1) (West 2004)," (Pet. Appx. 19a), and this very ground is one of the reasons for involuntary commitment under the MHDDC. 405 ILCS 5/1-119(1). In short, petitioner was involuntarily committed in this case because he was

subject to commitment under the MHDCC, not for a reason he asserts is unconstitutional. Accordingly, his claim that he was aggrieved by Illinois' provisions for involuntarily committing unfit criminal defendants has no basis.

This Court in *Jackson*, 406 U.S. at 738, held that

> a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

The Indiana statute did not satisfy due process because it subjected criminal defendants to indefinite commitment solely on account of incompetence to stand trial. *Id.* at 731. Defense counsel argued that Jackson's commitment under these circumstances amounted to a life sentence without ever being convicted of a crime where there was no evidence Jackson would ever attain competency for trial. *Id.* at 718.

Later, in *Jones v. United States*, 463 U.S. 354, 364 (1983), a case involving the involuntary commitment of insanity acquittees, this Court found that the "fact that a person has been found beyond a reasonable doubt to have committed a criminal act certainly indicates dangerousness." This Court further found such proof distinguished the case from *Jackson*, where indefinite commitment resulted merely from a finding of incompetence. *Id.*

n.12. "In *Jackson* there was never any affirmative proof that the accused had committed criminal acts or otherwise was dangerous." *Id.* Such concrete proof of dangerousness was at least as persuasive as any predictions about dangerousness that might be made in a civil commitment proceeding. *Id.* This Court upheld as reasonable and constitutional the hospitalization of individuals found to be dangerous and mentally ill. *Id.*

Illinois law is consistent with *Jackson* and *Jones*. In Illinois, after a court finds a defendant unfit for trial and subsequently determines that there is no substantial probability that the defendant will attain fitness within one year of the original finding of unfitness, the parties may move for a discharge hearing. *See People v. Waid*, 221 Ill.2d 464, 467 (2006); 725 ILCS 5/104-20; 104-23. In keeping with due process requirements, a discharge hearing is "'an innocent only' hearing, that is to say, a proceeding to determine only whether to enter a judgment of acquittal, not to make a determination of guilt." *Waid*, 221 Ill.2d at 470 (citations omitted). The question of guilt is to be deferred until the defendant is fit to stand trial." *Id.* (citation omitted). "At a discharge hearing, the trial court may make one of three findings. First, the court could find the State has carried its burden of proof in providing evidence by which the defendant may be proved guilty beyond a reasonable doubt." *People v. Manns*, 373 Ill. App. 3d 232, 238 (4th Dist. 2007); 725 ILCS 5/104-25 (a)-(d). If instead the court finds the defendant to be not guilty or not guilty by reason of insanity, the criminal proceedings are terminated. 725 ILCS 5/04-25(b),(c). If the prosecution sustains the burden of proof, the defendant is found "not, not guilty" and is subject to a treatment period of from one to five

years, depending on the seriousness of the offense charged. *Waid*, 221 Ill.2d at 471; 725 ILCS 5/104-25(d). In his brief before the Illinois Appellate Court, petitioner conceded that

> [t]he legislature seems to have attempted to facially comply with the mandates of *Jackson* by providing for an ordinary civil commitment under the jurisdiction of the criminal court. Therefore, Section 104-25(d) represents the legislature's determination of the maximum 'reasonable period of time necessary' to ascertain the probability of conducting a trial, after which *Jackson* requires a civil commitment or release. (Pet. App. Ct. Br. 27)

Indeed, under Illinois law, at the expiration of the treatment period set out in Section 104-25(d), the court must determine whether he is subject to involuntary admission under the Mental Health and Developmental Disabilities Code, or if he constitutes a serious threat to the public safety. *Waid*, 221 Ill 2d at 471. If he is so found, he is remanded to IDHS for treatment, but the treatment period may not be extended to exceed the maximum sentence to which a defendant would have been subject had he been convicted in a criminal proceeding. *Id.* at 471-2; 725 ILCS 5/104-25(g)(2),(4) The maximum potential sentence serves as a ceiling rather than a floor. *Waid*, 221 Ill.2d at 472. The defendant is to be released when he is no longer found to be subject to involuntary commitment after periodic reviews. 725 ILCS 5/104-25(g)(2),(3).

Thus, Illinois law squarely comports with *Jackson* and due process. Unfit defendants are not held indefinitely. They are not held beyond a reasonable time necessary to

ascertain the probability of attaining fitness in the foreseeable future, and they are not committed merely because they have been found to be unfit. Indeed, petitioner in this case was found to be subject to involuntary admission under the MHDD Code. (R. 71-2) Thus, he was found to (1) suffer from a mental illness, in this case schizoaffective disorder, and (2) likely to inflict serious harm on himself. 405 ILCS 5/119; Schiff, *et al.*, *Illinois Jurisprudence*, Criminal Law §15:22 (2007). The Illinois appellate court specifically affirmed these findings of fact. (Pet. Appx. 17a, 19a) Petitioner's claim that due process was violated is unavailing under these circumstances.

To the extent petitioner contends that the trial court's finding that he is a "serious threat to public safety" conflicts with ordinary civil commitment, several points bear noting. First, and foremost, this finding was surplusage to the factual finding that was affirmed by the Illinois appellate court. Second, the verbal formula "serious threat to public safety" is hardly distinguishable from the civil commitment standard, "reasonably expected to inflict serious physical harm upon himself . . . or another in the near future which may include threatening behavior or conduct that places another individual in reasonable expectation of being harmed." *See* 725 ILCS 5/104-25(g)(2); 405 ILCS 5/1-119(1). The trial court below did not find a distinction between the two.

Third, even assuming, *arguendo*, a distinction that makes a difference between these two findings, and thus, that Illinois law somehow permits commitment beyond civil commitment, such commitment is more than justified by this Court's jurisprudence upholding the commitment of individuals who are mentally ill and

dangerous. *See, e.g., Kansas v. Crane*, 534 U.S.407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (pointing out that states have in narrow circumstances provided for the forcible civil detainment of people who pose a danger to the public health and safety); *Jones v. United States*, 463 U.S. 354 (1983). The ABA Criminal Justice Mental Health Standards specifically advocate the adoption of a discharge hearing similar to that of Illinois and that unfit defendants found to have committed a crime beyond a reasonable doubt be treated exactly like insanity acquittees in terms of their involuntary commitment. *ABA Criminal Justice Mental Health Standards*, Standard 7-4.13 (1986) (Commentary). This Court dealt specifically with the commitment of insanity acquittees in *Jones v. United States*. Moreover, a federal court disposing of an unfit Illinois defendant's claim that he was treated disparately vis-a-vis civilly committed patients found no case holding that the state is powerless to distinguish between criminal and civil patients in matters of treatment. *Barichello v. McDonald*, 98 F.3d 948, 952-3 (7th Cir. 1996). *See also State v. Rotherham*, 122 N.M. 246, 259-61, 923 P.2d 1131 (1996) (upholding a similar statutory scheme against a substantive Due Process challenge under *Jackson* where unfit defendants were committed because they were mentally ill and dangerous).

In the instant case, there is no question that petitioner is mentally ill, as well as mentally retarded, and that he has been found to be dangerous in a number of ways: the prosecution proved that he committed a sexual offense against a minor beyond a reasonable doubt; he was found to be a danger to himself or others for purposes of civil commitment; and he was found to be a serious threat to

the public safety. Therefore, Illinois law is not in conflict in any way with the due process dictates of this Court and defendant has failed to provide this Court with a reason to grant the writ of certiorari on due process grounds.

Forfeiture aside, Illinois law also does not violate equal protection principles. A statute cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993). A classification "must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification." *Id.* (citations omitted). A statute is presumed constitutional and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (citations omitted).

Initially, the Court should note that petitioner is not necessarily subject to disparate treatment than he would receive under civil commitment. While petitioner contends that the standard for commitment is different, as was discussed *supra*, petitioner was committed under the same standard as applies in cases of civil commitment. While petitioner contends that the duration of commitment is longer under the Illinois Code of Criminal Procedure, that is also not the case. For one thing, petitioner's commitment must end under the Code of Criminal Procedure by August 12, 2010, whereas civil commitment could continue indefinitely so long as the patient continues to be subject to involuntary admission. 405 ILCS 5/3-813(b). The provisions for review of possible release are not disparate. After the first two periods

of civil commitment, reviews take place every 180 days, just as required by the Code of Criminal Procedure. 405 ILCS 5/3-813(a), (b); 725 ILCS 5/104-25(g)(2)(i). In both cases, patients are held only so long as they remain mentally ill and a danger to themselves or others. *Id.* While the Code of Criminal Procedure contains a default requirement that a defendant confined under its terms be placed in a secure setting, the statute also permits the judge the discretion to place a defendant in a less secure setting. 725 ILCS 5/104-25(g)(2). Notably, the Code of Criminal Procedure mandates that persons committed under its terms "be treated in the same manner as a civilly committed patient for all purposes," except that the criminal court retains jurisdiction and must approve any conditional release or discharge. The purported instances of disparate treatment are too insignificant to amount to real differences in treatment that might give rise to an equal protection claim.

Even assuming that petitioner has identified areas of actual disparate treatment between himself and those committed under the MHDD Code, a rational relationship exists between the purportedly different treatment and the legitimate governmental purpose of protecting the public from dangerous, mentally ill offenders. That rational relationship is predicated on the prosecution's proving the defendant's commission of a criminal offense beyond a reasonable doubt at the discharge hearing.

Numerous authorities, including this Court, support the existence of a rational relationship in this case. *See Jones v. United States*, 463 U.S. at 363-70 (Since due process did not require insanity acquittees, who have been found to have committed a crime beyond a reasonable doubt, be given particular procedural safeguards

provided in civil commitment cases, a rational basis existed for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees. Post-trial commitment for insanity acquittees is not considered punishment and is, instead, imposed solely for "the purposes of treatment and the protection of society." "It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment."); *State v. Rotherham*, 122 N.M. 246, at 254-59 (denying equal protection challenges that the criminal commitment standard was less stringent and that confinement was inconsistent with "the least drastic means principle" on the grounds that the law required a finding of dangerousness, the commitment was subject to periodic review and could not lead to permanent institutionalization as in *Jackson v. Indiana*, and because a criminal defendant undergoing treatment to attain competency is confined not only for treatment but also because he already has exhibited dangerous conduct, citing *Jones v. United States*). *See also Barichello v. McDonald*, 98 F.3d at 952-53 (No case holds that the state is powerless to distinguish between criminal and civil patients in matters of treatment); *Maust v. Headley*, 959 F.2d 644, 645-49 (7th Cir. 1992) (the plaintiff, an individual found unfit for trial and committed to the predecessor of IDHS, did not have a protected liberty interest in remaining in the least restrictive mental health facility as did individuals who were civilly committed); ABA Criminal Justice Mental Health Standards, Standard 7-4.13 (Commentary) (Advocating a statutory scheme, similar to Illinois' scheme, treating those found to be unfit and to have committed an offense beyond a reasonable doubt in the same way as insanity acquittees.

"That form of commitment may not be punitive as a constitutional matter. . . but instead is intended to precipitate the incapacitation, treatment, and ultimate release of a person whose mental condition poses a danger to the community, precisely congruent with the consequences [of a finding of insanity].").

As a rational basis exists for any purported disparate treatment between criminal and civil committees, there can be no equal protection violation. Illinois law comports with the Constitution, and no justification exists for granting the petition on these grounds.

Petitioner's claim that the discharge hearing constitutes a prohibited criminal trial of an unfit defendant is meritless. (Pet. 13-18) As discussed *supra*, the Illinois Supreme Court has determined that discharge hearings are not criminal trials. The only final outcomes at such hearings are "favorable to the defendant: a determination that he is not guilty, or not guilty by reason of insanity." *People v. Waid*, 221 Ill.2d at 472. "The question of guilt is to be deferred until the defendant is fit to stand trial." *Id.* at 471 (citation omitted); *People v. Manns*, 373 Ill.App.3d 232, 238 (4th Dist. 2007) (same). Indeed, the Code of Criminal Procedure provides for a criminal trial to take place following a discharge hearing in the event a defendant is restored to fitness for trial—a trial which would make no sense if the earlier discharge hearing was also a criminal trial of the same crime. 725 ILCS 5/104-25(g)(1). The ABA Criminal Justice Mental Health Standards advocate the use of "a procedural mechanism to determine factual guilt or innocence of nontriable defendants, in fairness to them, and to commit to compelled hospitalization dangerous former criminal defendants, in fairness to society." *ABA Criminal Justice*

Mental Health Standards, 7-4.13 (Commentary). Such a hearing permits defendants to avoid pending jeopardy in cases in which a defense can be established or the prosecution case is too weak to sustain a conviction, and an acquittal is final while a determination of guilt is not dispositive if a defendant later becomes competent and succeeds at trial. *Id.* (fn. 14). The ABA "is confident that adoption of the standard 7-4.13 approach to disposing of cases against permanently incompetent criminal defendants will achieve an appropriate balance between the needs of the criminal justice system and criminal defendants for the prompt disposition of criminal cases, the need of society to be protected against dangerous untried defendants, and the claim of defendants to have a procedurally fair trial unaffected by their present mental incompetence." *Id.*

Indeed, this procedure was sanctioned by this Court in *Jackson*. First, this Court noted that the petitioner's claim that the charges should be dismissed, because the record amply established his lack of criminal responsibility, was "substantial," but not ripe. *Jackson*, 406 U.S. 739. Second, this Court noted that both courts and commentators have pointed out the desirability of permitting some proceedings to go forward, despite the defendant's incompetence, and even cited states that allow an incompetent defendant a means by which to establish his innocence, without permitting a conviction. *Id.* at 740-41. This Court ruled that possibilities such as dismissal of the charges for lack of criminal responsibility would be open on remand of the case. *Id.* at 741. The Illinois statute authorizing discharge hearings was enacted effective 1979, in the wake of *Jackson*, *see* 725 ILCS 5/104-25 (West 1993), and reflects this Court's

approval of such procedures. As petitioner's claim that this procedure constitutes a criminal trial of an unfit defendant is without merit, this Court should not grant certiorari in this case.

Petitioner's claim that Illinois law is different than that of other states presents no reason for certiorari to be granted in this case. Petitioner's petition merely establishes that some states have not created statutory schemes that permit discharge hearings to take place. He fails to show a conflict between state courts of last resort—in fact, the Illinois Supreme Court has not rendered a decision on this point—and thus, his petition fails to meet this Court's Rule 10(b) concerning considerations governing review on certiorari. Notably, other states have enacted statutory schemes similar to that of Illinois. *See State v. Rotherham*, 122 N.M. 246 (1996); Mass. Gen. Laws ch. 123, §17 (2008). *See also* ABA Criminal Justice Mental Health Standards (1986).

Principles of comity and federalism do not require the laws of the 50 states to be precisely identical with one another. In Justice Brandeis' often-cited words: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co. v. Liebmann*, 282 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That Illinois law differs from some other states in permitting a defendant to get out from under criminal charges does

not in any way raise petitioner's claims to the level of an important federal question. As discussed above, Illinois law completely comports with this Court's decision in *Jackson*. Whatever differences remain between Illinois law and the laws of other states do not merit this Court's time and attention.

Defendant's final claim that he has presented an important question warranting review by this Court is undercut by his claim that Illinois' statutory scheme is similar to that of only one other state. (Pet. 18-22) Moreover, he has not shown how an Illinois court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Ct. R. 10(c). First, *Jackson* and *Jones* are well settled decisions. Any further pronouncements by this Court would be redundant. Second, as discussed above, Illinois law is in full accord with these decisions. Petitioner has failed to set out an appropriate ground for this Court to grant his petition for a writ of certiorari.

Petitioner has failed to demonstrate that this Court should grant a writ of certiorari in this case, not just because the decision he appeals from was an unpublished intermediate court order with no precedential value, and not just because he procedurally defaulted certain claims or failed to fully develop them below, but because the issue he seeks to resolve is not presented by this case and Illinois law fully accords with this Court's jurisprudence. All that would remain to petitioner is to claim that a properly stated rule of law was somehow misapplied in his case, a claim that would fail in any event. In light of all the foregoing, this Court should not grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LISA MADIGAN,
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-3000
Attorney for Respondent

RICHARD A. DEVINE,
State's Attorney
Cook County, Illinois
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
JAMES E. FITZGERALD,
ALAN J. SPELLBERG,*
JON J. WALTERS,
Assistant State's Attorneys,
Of Counsel.

*Attorney of Record

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In the Supreme Court of the United States

EMMANUEL BUCHANAN, BY AND THROUGH OZIA BREWINGTON, PLENARY GUARDIAN OF THE PERSON,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

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REPLY BRIEF OF PETITIONER

MARK J. HEYRMAN
Counsel of Record
UNIVERSITY OF CHICAGO
LAW SCHOOL
MANDEL LEGAL AID CLINIC
6020 S. UNIVERSITY AVE
CHICAGO, ILLINOIS 60637
(773) 702-9611

I. That the Illinois Appellate Court Decision Challenged in this Petition is Unpublished Does Not Effect the Need for This Court To Exercise its Certiorari Jurisdiction Since that Decision Is Compelled by Consistent Prior Decisions of Illinois Courts.

The State correctly points out that the decision for which Petitioner is seeking this Court's review was unpublished and, therefore, without precedential value under Illinois Supreme Court Rule 23. (State's Brief at 8-9) However, this fact does not support the State's argument that certiorari should not be granted. The Illinois Appellate Court expressly stated that its decision was compelled by its prior decisions in numerous other cases (Pet. App, 13a). The Court explained:

> ...we find, as we have repeatedly found in prior decisions, that *Jackson* is distinguishable from cases such as this one ...where the State has demonstrated evidence of the defendant's guilt. *People v. Barichello,* 305 Ill. App. 3d 13, 24 (1999), citing Barichello v. Campagna, 276 Ill. App. 3d 269 (1995); *Yiadom v. Kiley,* 204 Ill. App. Ed 418 (1990); *People v. Raseaitis,* 126 Ill. App. 3d 600 (1984). (Pet. App, 13a.)

After a further discussion of the meaning of these cases, the Illinois Appellate Court concluded:

> To the extent that defendant disagrees with a number of our prior decisions

> and argues for their reversal, we have reviewed those decisions and agree with them and therefore decline defendants request for us to reverse them, or otherwise depart from their holdings that *Jackson* is inapplicable to the circumstances presented in this case. (Pet. App, 14a.)

Thus, the reason why this Court should grant certiorari is that the unpublished decision challenged here has been the position expressed by Illinois courts consistently in published opinions. Moreover, the arguments challenging that position presented here have been expressly and consistently rejected by the Illinois courts in decisions which are published, precedential and govern every unfit criminal defendant in Illinois. This Court should grant certiorari to consider whether a finding that there is evidence beyond a reasonable doubt that an unfit defendant has committed a crime, in a hearing in which, by definition, the defendant has not been able to effectively participate, can be the basis for a special restrictive criminal commitment.

II. The State's Defense of Illinois' Refusal to Afford Petitioner a "Customary Civil Commitment Proceeding" is Predicated Entirely Upon The State's Unsupported and Unconstitutional Assertion That Petitioner Has Been Found to Have Committed a Criminal Act.

Petitioner has demonstrated that there are substantial differences in the *standard* for commitment, the *procedures* for commitment, the *length* of confinement and the *conditions* of confinement afforded him due to his status as an unfit defendant and despite the fact that there is not "a substantial probability that he will [become fit to stand trial] in the foreseeable future." Thus, these differences run afoul of the Due Process holding in *Jackson v. Indiana* that Petitioner be afforded the "customary civil commitment proceeding" 406 U.S. 308. The State's entire justification for these differences is that they view him to be guilty of a crime. (Brief in Opposition, pp. 18-20). Indeed, the State relies on the holding of this Court in *Jones v. United States,* 463 U.S. 354 (1983), that, since a plea of insanity is predicated upon an admission that the defendant committed a criminal act, the State may treat him differently than someone who has not either admitted to, or been found to have committed a criminal act. Of course, since Defendant is unfit he has never had a constitutionally adequate criminal trial and remains entitled to the presumption that he has not committed a criminal act.

The State fails to explain the relevance of the fact that commentators and, more importantly, this Court in *Jackson v. Indiana,* have encouraged states to create proceedings like Illinois' "discharge hearings" for the entirely salutary purpose of disposing of criminal charges pending against an unfit defendant when, as the State explains, "a defense can be established or the prosecution case is too weak to sustain a conviction." (State's Brief at 21). A criminal defendant, fit or unfit, can hardly complain that his Due Process rights have been violated by a proceeding which results in his prompt and complete acquittal and release!

However, the Illinois system challenged here stands this idea on its head. It uses the results of a discharge hearing to impose a lengthy and more restrictive criminal commitment upon unfit defendants based solely upon a proceeding in which, due to their unfitness, we can have no confidence and despite the fact that the only constitutionally adequate basis for confining an unfit defendant–to restore fitness–has disappeared. There is not a word in *Jackson* which suggests that this Court's support for allowing some proceedings to go forward despite the defendant's lack of fitness was an exception to either the central holding of *Jackson* limiting the duration of confinement of unfit defendants or this Court's consistent and longstanding holdings prohibiting a state from convicting and punishing unfit defendants. *See, e.g., Drope v. Missouri,* 420 U.S. 162 (1975); *Pate v. Robinson,* 383 U.S. 375 (1966). It would have been

an easy matter for this Court to have included, either in its detailed Due Process holding in *Jackson,* 406 U.S. at 738, or in its discussion of what might occur on remand, 406 U.S. at 741, some suggestion that a non-acquittal in a discharge hearing would justify Theon Jackson's continued confinement under terms other than those used for the "customary civil commitment proceeding." 406 U.S. at 738.

The State's position, which is entirely in accord with the intent, structure and effect of the Illinois confinement scheme being challenged by Petitioner, is well summarized by the following statement in the State's brief: "As a rational basis exists for any purported disparate treatment between criminal and civil committees, there can be no equal protection violation." (State's Brief at 20.) Of course, Petitioner completely agrees that the state may treat criminal committees differently than it treats civil committees. However, Petitioner is a *civil* committee because: (a) that is the holding of *Jackson*, 406 U.S. at 738; (2) because, under *Pate* and *Drope,* an unfit defendant cannot be subjected to a criminal trial; and (3) because the State's sole basis for claiming he may be treated as a *criminal* committee is the results of a criminal trial during which the State concedes he was unfit to stand trial.

Finally, the State argues that a discharge hearing is not a criminal trial being imposed upon a unfit defendant in violation of *Pate v. Robinson* and *Drope v. Missouri* because it is possible for someone who has been found guilty in a discharge hearing to be

restored to fitness later and then have a "real" criminal trial. (State's Brief at 20.) However, this outcome is quite unlikely in practice and contrary to the express provisions of the statute. That is because discharge hearings are only afforded to persons who "cannot become fit to stand trial" 725 ILCS 5/104-23(a). Moreover, Petitioner Buchanan will never have this supposed benefit since he has been repeatedly found unlikely to *ever* become fit.

Additionally, the possibility, however unlikely, of a second criminal trial does not negate the criminal nature of a discharge hearing given that:

1) The statute setting forth the discharge hearing procedures provides: "The State and the Defendant may introduce evidence relevant to the question of the defendant's guilt of the crime." 725 ILCS 5/104-25(a). No other type of evidence (such as evidence relating to the defendant's mental illness or dangerousness) is specified as admissible.

2) In a discharge hearing, the court must determine whether "the evidence does not prove the defendant guilty beyond a reasonable doubt" Section 104-25(b). This Court has made it clear that proof beyond a reasonable doubt is necessary in criminal cases, but not civil commitments. *Addington v. Texas,* 441 U.S. 418 (1979).

3) A defendant not given an "order of acquittal...may appeal from such judgment in the same manner provided for an appeal from a conviction in a criminal case." Section 104-25(f)

4) The length of confinement imposed for those "not acquitted" is determined by "the most

serious charge upon which the State sustained its burden of proof." Section 104-25(d). It is further controlled by "the maximum sentence to which the defendant would have been subjected had he or she been convicted in a criminal proceeding....[T]he maximum sentence shall be determined by Section 5-8-1 of the Unified Code of Corrections, excluding any sentence of natural life." Section 104-25(g)(4).

5) Illinois courts have repeatedly stated that the "primary reason" a defendant is committed under Section 104-25 (g)(2) is "due to the criminal acts he perpetrated." (Pet. App, 14a, quoting *People v. Polachek*, 128 Ill. App. 3d 200, 205 (1984)).

Even the most generous interpretation of the Illinois confinement scheme for permanently unfit defendants does not hide its criminal nature and punitive intent. This is not the "customary civil commitment proceeding" used in Illinois as required by this Court's holding in *Jackson*. In the end, the State's argument is just circular–a discharge hearing cannot be a criminal trial because, if it were, that would be unconstitutional. Petitioner respectfully urges this Court to grant certiorari and hold that a discharge hearing *is* a criminal trial and it *is* unconstitutional.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Mark J. Heyrman
Counsel of Record
University of Chicago Law School
Edwin F. Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
(773) 702-9611